

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1098

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VICTOR RAMIREZ,

Defendant-Appellant.

Docket No. 77-1098

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
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The Government argues that Rules 901(a) and 901(b)(5) of the Federal Rules of Evidence set forth the requirements for the foundation necessary for the admissibility of tape recordings. The Government's reliance on these rules shows that it has confused the admissibility of voice identification testimony with the admissibility of the tapes themselves. Indeed, an examination of the relevant commentary to Rule 901(b)(5) clearly demonstrates that appellant's position on the question

is correct and that the Government failed to lay a proper foundation for the admissibility of the tapes in question.

Rule 901 of the Federal Rules of Evidence deals generally with the requirements of authentication. As to the predicate necessary for voice identification testimony, the Rule indicates that the following would be sufficient:

[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

This statement is simply a legislative codification of the relevant principle reiterated by this Court. See, e.g., United States v. Arredo-Sarmiento, 545 F.2d 785, 792 (2d Cir. 1976); United States v. Albergo, 539 F.2d 860, 864 (2d Cir. 1976); United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), cert. denied, 417 U.S. 944 (1974).

However, the question of the admissibility of testimony about voice identification is separate from that involving the predicate for the admissibility of the tapes upon which that voice is heard. As to the latter, one commentator has noted:

Sound recordings are admissible in evidence provided a proper foundation has been laid for their admission.

Weinstein and Berger, Commentary on Rules of Evidence for the United States Courts, ¶901(b)(5)[02] at 901-69 (1975).

Recognizing that under Rule 901 the correct standard for this foundation was that articulated by Judge Herlands in United

States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958); (see appellant's main brief, Point I), this commentator has stated:

A proper foundation, Judge Herlands wrote, consists of the following elements:

(1) That the recording device was capable of taking the conversation now offered in evidence.

(2) That the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes, additions or deletions have not been made in the recording.

(5) That the recording has been preserved in a manner that is shown to the court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

Weinstein and Berger, supra, at 901-70.

Thus, Rule 901 did not change the predicate for the admissibility of tapes, and absent compliance with the McKeever requirements, the tape recordings should not have been admitted.

The court should refuse to admit a recording into evidence if speaker identification or any of the other elements of authentication are lacking.

Weinstein and Berger, ibid.; emphasis added.

Since the district court failed to comply with this rule and the Government did not lay the proper foundation, the tapes should not have been allowed into evidence (appellant's main

brief, Point I).

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the judgment of the district court must be reversed and the indictment dismissed; in the alternative, a new trial must be ordered.

Respectfully submitted,

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July 14, 1977

CERTIFICATE OF SERVICE

July 15, 1977
^{reply}

I certify that a copy of this ^{reply} brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. L. Hermann

